Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2401

In the Supreme Court of the United States

OCTOBER TERM, 1982

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

GLENN O. YOUNG, *pro se*
P. O. Box 1086
Sapulpa, Oklahoma 74066
(918) 224-3131

Attorneys for Petitioners

September, 1982

TABLE OF CONTENTS

	PAGE
REPLY BRIEF OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION	1
ISSUE BEFORE THE COURT	3
CONCLUSION	5
APPENDIX AA: Petition in the District Court of Creek County, Sapulpa Division, filed Sept. 14, 1979.	
APPENDIX BB: Opinion of Justice McWilliams, 10th Circiut Court of Appeals, filed April 30, 1979.	

TABLE OF AUTHORITIES

United States Code

28 U.S.C. § 1441 ..... 1, 3, 5

Miscellaneous

Black's Law Dictionary, 723 (Rev. 5th Ed. 1979) 2

Webster's International Dictionary (2d ed. 1934), p. 756 2

No. 81-2401

In the Supreme Court of the United States

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS (Rule 22.5)

In opposition to Petitioners' prayer for a Writ of Certiorari, respondents' distinguished attorneys rely upon a single proposition, to-wit: that, in 28 U.S.C. § 1441, Fidelity, for the purposes of this case, is not a citizen of Oklahoma because the term "liability insurance" ~~includes~~ excludes "life insurance."

Sole authority for this contention is *Black's Law Dictionary*, 723 (Rev. 5th Ed. 1979). They concede that therein, the term "liability insurance" is defined as:

> "That form of insurance which indemnifies against liability on account of injuries to the person or property of another."

They follow with a statement that:

> "The policy at issue in both the cases filed by Petitioners was a policy of life insurance. Life insurance is *distinguishable* from liability insurance, 'being a contract between a holder of a policy and an insurance company . . . whereby the company agrees, in return for premium payments, to pay a specified sum to the designated.'" (Italics added)

The sole authority cited by them is the same, *viz.*, *Black's Law Dictionary*, 723 (Rev. 5th ed. 1979). No decision by any court that "liability insurance" *excludes* "life insurance" is cited or has been found by your counsellor in a diligent search of the authorities.

The error in their logic lies in their statement (page 4) that: "Life insurance is *distinguishable* from *liability* insurance." (Italics added)

Distinguishable is defined in *Webster's International Dictionary* (2d ed. 1934), page 756, *inter alia*, as "capable of being distinguished . . ." Not that it is or has been distinguished. The same authority, at page 1423, describes *liability* as:

> "State or quality of being liable, as the liability of an insurer . . ."

Respondents cite no case nor authority for their contention that in 28 U.S.C. § 1441,

"a policy is a contract of liability insurance"

does not include *any policy or contract whereby the insurer assumes liability.*

ISSUE BEFORE THE COURT

A further flaw is obvious in their reasoning. The issue here is whether, on any ground, the cause of action Petitioners filed in the District Court of Creek County, Oklahoma was, upon its face, or based upon any evidence tendered by them, one of which the U. S. District Court had jurisdiction. A copy of the Petition therein is hereto appended as Appendix "AA". That the issue upon which respondents hang their hat was neither considered nor determined is apparent from the Judgments appearing in Appendices "A", "B", "C", "D" and "E" to the Petition for Writ of Certiorari of Petitioners, and further apparent from the published Opinion by Mr. Justice McWilliams, Circuit Judge, which, for convenience, is also appended hereto as Appendix "BB".

Respondents take no issue on Petitioners' allegation that on Motion to Remand, the burden of proof of federal jurisdiction is upon them. This included, obviously, proof that the U. S. District Court below had jurisdiction in absence of Petitioners to render the Judgment appended to the Petition herein as Appendix "C", allowing *attorneys' fees* in the sum of $5,165.00 instead of $3,651.25, entered August 5, 1980, against each and every petitioner herein. In this connection, this Court will note that if the Judg-

ment in the case wherein all petitioners, save the murdered son's mother, herein were expressly excluded, the issues herein became *res judicata*. It follows that costs in that case were as effectively *res judicata* as any other issue. Not only so, but the Judgment claimed to be *res judicata*, as disclosed by the record herein, was *rendered before the Oklahoma Statute allowing any attorneys' fees had been enacted*. This is revealed by the Opinion of the Circuit Court itself. (See footnote quoting it, Petition App. 7a.)

In the Opinion asserted to be *res judicata* (hereto appended as Appendix "BB"), it will be noted that the Circuit Court disregarded the express provisions of both the Application for Insurance and the Policy declaring the policy in controversy ineffective until and unless manually delivered to the insured while in the same state of health as at the date of the application. The Circuit Court concluded its Opinion with the following paragraph:

> "Based on the undisputed facts, the effective date of the insurance policy was September 16, 1974, and as only two monthly premiums had been paid, the policy by its terms had lapsed when the insured met his untimely death on February 14, 1975. The trial court, under the circumstances, did not err in granting summary judgment for Fidelity Union."

Petitioners reiterate for emphasis the irrefutable fact that in both denying recovery in the first case and holding the issue *res judicata* in the case at bar, both Judgments are void upon the face of the record. The insurance policy was dated September 18, 1974, hence could not have been, on the undisputed facts, effective September 16, 1974, that is *two days before the application was received, approved*, or the policy in question dated, issued or delivered.

The undisputed evidence is that the policy became effective on delivery December 22, 1974. Calculated from that date, premiums were paid in full to February 22, 1975 (two months). If the grace period (31 days) be added, the policy did not lapse until March 25, 1975, i.e., *after* the death of the insured, United States Airman, Thomas Alexander Young, on February 14, 1975. (February 1975 had 28 days.)

CONCLUSION

The Brief of Respondents in opposition to Petition for Certiorari only buttresses and reinforces the fact that under Rule 13, there are special and important reasons why the Writ sought herein should be granted. The issue of domicile of an insurer like Fidelity under 28 U.S.C. § 1441 is of general public concern throughout the Nation and should be, but has never been, decided.

Respectfully submitted,

GLENN O. YOUNG, *pro se*
P. O. Box 1086
Sapulpa, Oklahoma 74066
(918) 224-3131

Attorneys for Petitioners

September, 1982

APPENDIX AA

IN AND FOR THE DISTRICT COURT OF
CREEK COUNTY, SAPULPA DIVISION,
STATE OF OKLAHOMA

[Filed Sept. 14, 1979]

ULRICH WALDEMAN YOUNG, a Minor, NORBERT NELSON YOUNG, and CHARLOTTE MARIE YOUNG, and GLENN O. YOUNG in person and as the Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,	)	
Plaintiffs,	)	No. C-79-301
vs.	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, as Agents and Attorneys,	)	
Defendants.	)	

PETITION

Plaintiffs allege that on September 16, 1974, Thomas Alexander Young completed and executed an Application for insurance with defendant, Fidelity Union Life Insurance Company through defendant Glen Rinehart, its local agent in Dallas, Texas. The application was for life insurance in the amount of Twenty Thousand Dollars ($20,000.00) with double indemnification in case of accidental death and with a provision for waiver of premiums in the event of disability. On the date Young completed the application, he gave the agent a money order in the amount of $30.06 as payment for the first month's premium which was promptly

delivered to Fidelity Union Life Insurance Company whose home office is in Dallas, along with the application. The application contained the following language concerning the effective date of the policy:

> *"I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered while the state of health of the proposed insured is as stated in this application and the first premium actually paid . . ."*

Plaintiff alleges that said local agent orally represented to said Young, at the time said application was issued, that a policy conformable thereto would be issued and delivered to him promptly for his examination and approval; that thereupon and conformable to said insurance policy, the same would become in full force and effect. Its policy which was, through no fault of applicant, retained, held and kept by said company, its aforesaid agent, Rinehart, or others, to defendant unknown, and not manually delivered until December 22, 1974, from which date to the death of the insured on Feb. 14, 1975 all premiums due and earned were fully paid.

That said policy of insurance contained a provisio upon its face reading as follows:

> *"Now that you have bought this policy beware of any agent who advises you to discontinue it in order to take another in its place. He may be seeking his own profit at your expense. If he is sincerely interested in your behalf, he will be willing to submit his recommendations to you in writing, suggesting his reasons for recommending that you replace your Fidelity Union Policy. Then we will be glad to advise you if you forward his recommendations to us.*
>
> *To collect any benefit due under a Fidelity Union Life Policy, write direct to the Company. It is not necessary to employ any person, firm or corporation*

in collecting the insurance under this policy or in receiving any of the benefits. Time and expense will be saved by writing direct to the Home Office of the Company, Dallas, Texas."

Plaintiffs further allege that in efforts to avoid obligations assumed and due under said policy and notwithstanding the aforesaid proviso, said defendants, acting jointly, and in furtherance of a common design, together with other agents, Charles E. Eubanks, Robert L. Taylor, Jr., and others to plaintiffs unknown, have continued and do continue to evade and avoid payment conformable to said policy, more particularly by acts such as the following:

1. Upon learning of the death of said decedent, or in anticipation thereof, they destroyed or caused to be destroyed all their original records pertinent thereto.
2. Denied the issuance and delivery of a policy and pretended they had two insureds of the same name and couldn't determine the policy involved.
3. Asserted Glenn Darrell Rinehart had no authority to collect insurance premiums, save the first.
4. Refused to produce or furnish plaintiff or Glenn Olen Young a copy of the agency contract.
5. Represented that there had been a "change in policy", but refused to elaborate or explain or to furnish a copy thereof or any details concerning the same.
6. Refused repeatedly to furnish copies of correspondence, more particularly letters from Thomas and her, and a letter from Glenn Darrell Rinehart to plaintiff, which plaintiff returned at the time she remitted the premium hereinabove referred to.

7. Denied payment of premiums to said agent, Rinehart, by or on behalf of plaintiff's son, Thomas, had been made, and if made, were binding or valid.

8. Concealed and denied issuance of the aforesaid notice, anent the January, 1975 premium on any insurance policy.

9. Aided, abetted and induced Glenn Darrell Rinehart, its agent, to refuse to talk, testify or give evidence within his knowledge concerning the "change in policy" or reasons for delay in delivery of said policy and payment of premiums thereon.

10. Falsely wrote a letter dated December 29, 1975, wherein said defendant by its Vice President and Associate General Counsel, Robert L. Taylor, Jr., C.L.U., stated:

    (a) "Your charges that the agent's move to California was related to this lawsuit are absolutely untrue and unfounded . . ."

    (b) "This company has made available to your attorney and to the Oklahoma Department of Insurance a full and complete disclosure of all of its records and actions with regard to this policy and to this claim."

    (c) ". . . when you visited our Home Office, our Claims Manager, Mr. Eubanks, made you hard copies of our microfilm records of this particular policy . . ."

    (d) "The policy was not in force on the date of his death . . ."

    (e) "It's regretted the policy was not in force when your son died."

That all benefits under said policy, including premiums paid, have been retained, held and kept by defendants to the damage and detriment of plaintiffs in the sum of Forty Thousand Dollars ($40,000.00) plus statutory interest, additional damages, attorney fees and costs in a sum of Twenty-five Thousand Dollars ($25,000.00) for which plaintiffs bring this suit and pray judgment.

(s) *Glenn O. Young*
Glenn O. Young, *pro se*

APPENDIX BB

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed April 30, 1979]

No. 77-1606

CHARLOTTE MEIER YOUNG, in person and as Assignee in trust for her minor sons, NORBERT NELSON and ULRICH WALDEMAR YOUNG,
Plaintiff-Appellant,
v.
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D. C. No. 76-C-30)

Wesley R. Thompson, for Plaintiff-Appellant.

James M. Sturdivant (Elsie Cox Draper and GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, on the brief), for Defendant-Appellee.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

[APPENDIX]

McWILLIAMS, Circuit Judge.

The issue here is whether the trial court erred in holding that a policy of life insurance issued to one Thomas Alexander Young by Fidelity Union Life Insurance Company had lapsed for non-payment of premiums prior to Young's death. We hold that the trial court did not err, and we therefore affirm.

Charlotte Meier Young, in her own name and as a so-called "assignee in trust" for two minor sons, brought the present action against Fidelity Union on a policy of life insurance issued to another son, Thomas Alexander Young. The latter was shot and killed by a robber on February 14, 1975. One issue formed by the pleadings was whether the policy of insurance was in force and effect on the date of the insured's untimely death or, on the contrary, had lapsed because of non-payment of premiums. Both Young and Fidelity Union filed motions for summary judgment supported by affidavits and depositions. The trial court granted Fidelity Union's motion and denied Young's. The latter now appeals the judgment entered in favor of Fidelity Union.

On September 16, 1974, Thomas Alexander Young completed and executed an application for life insurance with Fidelity Union through its local Oklahoma agent. The application was for life insurance in the amount of $20,000, with double indemnification in the case of accidental death and with a provision for waiver of premiums in the event of disability. On the date that Young completed the application, he gave the local agent a money order in the amount of $30.06 as payment for the first month's premium. The money order was forwarded to Fidelity Union along with the application. The application contained the following language concerning the effective date of the policy:

> I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered

while the state of health of the Proposed Insured is as stated in this application and the first premium actually paid. If the full first premium is paid at the time of this application and in exchange for the Conditional Receipt bearing the same number as this application and if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the Company's rules and practices for the policy, in the amount, on the plan, and otherwise exactly as applied for, then the insurance shall be effective from this date or the date of the last of any medical examinations or questionnaires required by the Company, if later, subject to the terms of the policy applied for and of the Conditional Receipt.

In exchange for the first month's premium, the local agent gave Young a so-called Conditional Receipt which bore the same number as the application and contained the following language:

1. This payment is made and accepted subject to the following conditions: (1) if settlement for the first full premium is made at the time of making this part of the application and (2) if on that date Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office insurable and acceptable under the Company's rules and practices for the policy in the amount, on the plan, and otherwise exactly as applied for, and if both conditions are met then the insurance shall be effective from date of this application, or the date of the last of any medical examinations or aviation or occupational questionnaires required by the Company in connection with this application, if later.

On September 18, 1974, a policy of life insurance was issued to Young by Fidelity Union in the face amount of

$20,000, with a double indemnity provision in case of accidental death and with a provision for waiver of premium in the event of disability. The policy was mailed by Fidelity Union on October 1, 1974, to the local agent for delivery to Young. Young was then in military service and stationed at Lakeland Air Force Base in Texas. The local agent wrote to Young informing him that the policy had been received.

Fidelity Union's pre-authorized check drawn on Young's account in the Utica National Bank and Trust Company, Tulsa, Oklahoma for payment of the monthly premium due on October 18, 1974, was returned unpaid, marked "account closed." The local agent then sent a new pre-authorized check card to Young in Texas, and also advised Young's parents of the closed account and of his request that a new pre-authorized check card be completed. Instead of a new pre-authorized check card, the local agent received a check from the insured's mother, Charlotte Meier Young, the plaintiff and present appellant, dated November 18, 1974, in the amount of $30.05, payable to Fidelity Union. This payment was forwarded to Fidelity Union and deposited.

The local agent later forwarded the policy to Young at his mother's home address as he was unable to arrange a personal appointment with the insured who, as indicated, was then serving in the United States Air Force. The policy was received at the home of Young's parents in Kiefer, Oklahoma on or about December 15, 1974, and given to the insured by his mother on December 22, 1974. No further premium payments were made, and notices that the policy had lapsed and requests for a new pre-authorized check card were sent to the insured on January 3, 1975, and February 5, 1975. Young died on February 14, 1975.

The policy provided for a 30-day grace period which continued coverage for 31 days after a premium became due but was unpaid, and further provided, however, that the policy would be cancelled and forfeited if the premium due had not been paid by the end of the grace period.

It is the position of Fidelity Union that the effective date of the policy was September 16, 1974, the date on which Young made application with Fidelity Union for the issuance of an insurance policy, and that only two monthly premiums had been paid and received. Thus, according to the insurance company, the policy was in effect for only two months, plus the additional thirty-one day grace period, and that coverage had therefore lapsed on December 19, 1974, some 57 days prior to the insured's death on February 14, 1975.

It is the plaintiff's position that, under the provisions of the application, the insurance policy was not in force and effect until it was "manually delivered" to the insured on December 22, 1974. Therefore, according to the plaintiff, the two monthly premium payments, which were received by Fidelity Union, i.e., the one made by the insured on September 16, 1974, when he executed the application, and the second made by the insured's mother on November 18, 1974, provided for coverage for two months subsequent to the manual delivery of the policy on December 22, 1974. Under this approach, the policy of insurance would have been in force and effect on February 14, 1975, the date of the insured's death.

Where an insurance policy contains ambiguous or equivocal language, it should be interpreted favorably to the insured. Unigard Ins. Co. v. Studer, 536 F.2d 1337, 1339 (10th Cir. 1976). However, a court cannot resolve an ambiguity where none exists, and an unambiguous insurance constract, like any other contract, should be enforced as written. Hercules Cas. Ins. Co. v. Preferred Risk Ins. Co., 337 F.2d 1, 3 (10th Cir. 1964).

We find no ambiguity in the language appearing in the application relating to the effective date of the policy. The first sentence in the excerpt from the application set forth above provides that there shall be no liability until a policy has been issued and manually delivered to the

insured. The second sentence in that quotation, however, provides for a method whereby the insured may obtain immediate coverage. The second sentence provides, in essence, that the insurance shall be effective from the date of the application if the first premium is paid in full and the policy is issued exactly as applied for. The Conditional Receipt given the insured by the agent contained language substantially similar to the language in the application concerning immediate coverage.

In the instant case, Young paid the first month's premium on the same date that he executed the application. Such is a strong indication that the insured himself believed that he was covered as of that date. The policy which Fidelity Union issued two days later is, in our view, exactly what Young had applied for, i.e., life insurance in the amount of $20,000, with double indemnity provisions and a waiver of premium payments in case of disability.

It is plaintiff's contention that the policy issued by Fidelity Union was not *exactly* as applied for because of a premium differential. As indicated, the local agent had informed Young that the monthly premium was $30.06, and Young had given the agent a money order in that amount. The policy actually issued called for a monthly premium in the amount of $30.05. We deem this difference in premium between the application and the policy to be *de minimus*. Actually, if we understand it correctly, the one cent difference in the monthly premium is in favor of the insured. Also, the fact that the policy was dated September 18, 1974, does not constitute a variance from the application. In short, the policy issued was as applied for.

It is plaintiff's further suggestion that the language in the second sentence in the quotation from the application set forth above did not in any way obligate Fidelity Union to issue the policy applied for and was therefore illusory in nature. We do not agree. Under the terms of the ap-

plication, Fidelity Union was bound to issue the policy as applied for, assuming that certain stated conditions were met. In any event, this matter is somewhat academic, inasmuch as Fidelity Union did in fact issue the policy. Plaintiff is not seeking to disavow the contract and to obtain a return of the premiums paid. Rather, she is suing on the policy and is bound by the stated terms under which it was issued.

Based on the undisputed facts, the effective date of the insurance policy was September 16, 1974, and as only two monthly premiums were paid, the policy by its terms had lapsed when the insured met his untimely death on February 14, 1975. The trial court, under the circumstances, did not err in granting summary judgment for Fidelity Union.

Judgment affirmed.